

UNACCOMPANIED MINORS SEEKING FOR PROTECTION IN THE EUROPEAN UNION: WILL A FAIR AND ADEQUATE ASYLUM SYSTEM EVER SEE THE LIGHT?

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1. – Introduction

In recent years¹, irregular migration – especially by the Mediterranean Sea – has

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¹ See the recent Monthly Report of the EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, FRA, *Monthly data collection on the current migration situation in the EU*, July 2016. See also ID., *FRA Annual Report, Asylum and migration into the EU in 2015*, 2016, available at: <http://fra.europa.eu/en/publication/2016/fundamental-rights-report-2016>.

Migration and Development[altri dati]

become a huge phenomenon that all European States have the duty to deal with². What has been defined as a “migration crisis”³ consists in mass influx of people fleeing their countries and seeking for protection in Europe. Several elements interfere with the actual capacity of the EU and its Member States to cope with this issue.

First, the migration management entails overwhelming costs⁴, leading to the perception that irregular migration is a mere burden for the destination country. The mass influx of migrants is indeed perceived as having negative implications (for instance in terms of jobs’ losses and the increase of criminality⁵), and lacking any social and/or economic advantage.

Second, the migration crisis represents an actual challenge towards the European States’ commitment to protect human rights under the European Convention of Human Rights and the European Union.

Moving from these remarks, the aim of the present investigation is twofold: the paper will firstly explain the potential benefits that the destination countries could descend from migration. Secondly, the paper will highlight the criticisms of the current Common European Asylum System (CEAS)⁶ and appreciate the positive

² See the Statement of the Special Meeting of the European Council on 23 April 2015 where that of migrants seeking for protection crossing the Mediterranean Sea has been described as a “humanitarian emergency”. Furthermore, see TINO, CAUDRON, “Flux migratoires et politique commune dans l’Union européenne”, *federalismi.it*, 10/2013, p.1 ff.

³ See the report of the UK Home Affairs Committee, “Mass Migration” (3 August 2016) HC paper No.24, available at: <http://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/24/2402.html>.

⁴ On the necessity to rethink the implementation of the Refugee Convention to help States in understanding and enjoying the benefits of migration, see HATHAWAY, “A Global Solution to a Global Refugee Crisis”, *European Papers*, 2016, Vol. 1, p. 93 ff.

⁵ RATHA, MOHAPATRA, SCHEJA, “Impact of Migration on Economic and Social Development. A review of Evidence and Emerging Issues”, Policy Research Working Paper 5558, The World Bank Development Prospectus Group Migration and Remittance Unit & Poverty Reduction And Economic Management Network, February 2011, pp. 1 – 39, p. 11.

⁶ The Common European Asylum System (CEAS) has been created since 1999 and it currently comprises the following acts: the European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, OJ 2013, L 180/60 (Revised Asylum Procedure Directive); the European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down minimum standards for the reception of applicants for international protection, OJ 2013, L 180/96 (Revised Reception Conditions Directive); the European Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, OJ 2011, L 337/248 (Revised Qualification Directive); the European Parliament and Council Regulation (EU) No 604/2013

and negative implications of the recent proposals for its reform.

In order to both disclose the positive implications of migration in the host countries and highlight the shortcomings of the current European asylum system, the present paper will specifically tackle the category of unaccompanied minors seeking protection in Europe.

2. – *Coping with an ‘enhanced vulnerability’: the case of unaccompanied asylum seeking minors*

The choice to specifically focus on unaccompanied minors is grounded on several reasons. First of all, the percentage of minors asking for asylum within the European Union is increasing: in 2015, 7% of all asylum applications in the European Union were lodged by unaccompanied children⁷.

Secondly, when the asylum seekers are unaccompanied minors, the struggle in balancing the States’ control over the entry of non-nationals with refugees’ fundamental rights increases, as long as States are bound by additional rules imposing them to take into account minors’ best interest⁸.

The need to respect both the vulnerability of minors and the *non-refoulement* principle lies on the observation that children are “twice weak”: on the one side, notwithstanding their refugee *status*, minors should receive protection by international and national law because of their vulnerable age, which prevents them from being autonomous and independent⁹. On the other side, they should receive protec-

of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, OJ 2013, L 180/108 (Revised Dublin Regulation); the European Parliament and Council Regulation (EU) No 603/2013 of 26 June 2013 on the establishment of ‘Eurodac’ for the comparison of fingerprints, OJ 2013, L 180/78 (Revised Eurodac Regulation).

⁷ See European Asylum Support Office (EASO), Annual Report on the Situation of Asylum in the European Union 2015, July 2016, p. 109.

⁸ See Arts. 3, 12 and 22, of the United Nations Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, and entered into force the 2 September 1990. On this topic see also EUROPEAN PARLIAMENT, DIRECTORATE GENERAL FOR INTERNAL POLICIES, *EU Framework of Law for Children’s Rights*, 2012, PE462.445.

⁹ European Court of Human Rights, *Rahimi v. Greece*, Application No. 8687/08, Judgment of 5 April 2011, para. 87, where the Court stressed that States have a positive obligation to protect and provide care for extremely vulnerable individuals, such as unaccompanied minors, regardless of their status as illegal migrants, nationality or statelessness. The particular vulnerability of unaccompanied children is

tion because they are asylum seekers¹⁰.

At this regard it has been argued that asylum seeking children “should be treated as children first and migrants second”¹¹, meaning that it is necessary to take into prior consideration the significant vulnerability of the claimants.

As a consequence, the State being responsible for an asylum application has to deal with some additional issues, such as the necessity to *i*) provide a representative taking the side of the minor’s claim; *ii*) take into account the minor’s point of view and – notwithstanding her/his age assessment – consider his/her experience as a relevant element in the asylum procedure; *iii*) assess the possibility of reunifying the minor with his/her relatives; *iv*) ponder the concrete impact that the eventual deport of the minor will have on his/her life; *v*) opt for the child’s detention only as a last resort measure and only by adopting additional safeguards¹².

Moving from these latter remarks, specific rules focusing on asylum seeking minors have been and shall be created in order to implement the respect of their rights and promote their integration within the host country¹³.

Against this backdrop, the situation of unaccompanied asylum seeking minors seems to be a good case-study to assess the adequacy of the system implemented within the European Union. As it will be explained in the following sections, on the one side, States can attain further social and economic advantages when accommodating migrant minors. On the other side, the failure of the CEAS – both in terms

emphasized also by the COMMITTEE ON THE RIGHTS OF THE CHILD, *General Comment No. 6*, 2005, CRC/GC/2005/6, paras. 23 and 24.

¹⁰ Art. 3(1), United Nations Convention on the Rights of the Child, cit. *supra* note 8. On this topic HODGKIN, NEWELL, *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Publications, 2007, pp. 1 – 229.

¹¹ See WARREN, YORK, “How children become ‘failed asylum-seekers’”, Kent Law Clinic, University of Kent, March 2014, pp. 1 - 44.

¹² KTISTAKIS, *Protecting Migrants under the European Convention on Human Rights and the European Social Charter. A handbook for legal practitioners*, Council of Europe Publishing, 2013, p. 37. See, European Court of Human Rights, *Rahimi v. Greece*, cit. *supra* note 9, para. 109; Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, Application No. 13178/03, Judgment of 12 October 2006.

¹³ As pointed out by WHITTAKER, “Asylum seekers in Europe: Facts and Debate”, in ID., *Asylum seekers and refugees in the contemporary world*, Routledge, 2006, p. 40, the achievement of an effective integration involves several issues, such as language, family reunion, accommodation, health care and education. On this topic, see also SPENCER, HUGHES, “Fundamental rights for irregular migrants: legal entitlements to healthcare and school education across the EU28”, *European Human Rights Law Review*, 2015, pp. 604 – 616, p. 608; SMYTH, “Is the Right of the Child to Liberty Safeguarded in the Common European Asylum System?”, *European Journal of Migration and Law*, 2013, Vol. 15, pp. 111 – 136.

of efficiency and respect of fundamental rights – is particularly striking with regard to minors' applications.

3. – Accommodating migrants and promoting the development of the host country: two birds with one stone?

Before entering the analysis of the current CEAS and its foreseen amendment, it has to be clarified whether the several concerns raised by destination countries could be justified.

To answer this question, it is essential to assess if the presumption that irregular migration has only negative effects on host countries can be rebutted. Therefore, the arguments usually invoked by Member States must be tackled.

Among them, the increase of criminality is one of the most exploited considerations. Despite the absence of a proven relationship between the number of irregular migrants and the number of crimes, the general trend within the European politic debate is to argue that irregular migrants have to be considered as a threat for internal security.

At this regard, it is first of all essential to understand the nature of the link between migration and criminality. On the one side, it should be stressed that irregular migration in itself does not impact on criminality: the large majority of migrants infringing the European borders every day are seeking a decent future for themselves and their families, not to start criminal activities. However, on the other side, it has to be observed that the significant vulnerability of irregular migrants exposes them to the risk of being exploited by and eventually absorbed into criminal networks. In other words, criminality could indirectly take advantage of irregular migration.

Dealing with two sides of a same coin, a strong capacity of accommodating asylum seekers, from their very first arrival until the assessment of their claim, is therefore essential to ensure the respect of migrants' human rights, but also to prevent migrants from being targeted within criminal activities.

Another *refrain* issue connected to migration flows deals with the social impact of migration on the destination countries: in particular, migrants' needs for health¹⁴

¹⁴ The right to accede to healthcare has been recognised as a component of the human dignity: see European Committee on Social Rights, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, Judgment of 3 November 2004.

and social services are perceived as burdens by the host States. At this regard, the risk that the migrants' assistance would eventually affect the EU citizens' rights is a shared belief¹⁵.

Furthermore, migrants are usually accused of jeopardizing the balance of the national labour market, essentially because they are willing to bear undeclared work and lower employment rates¹⁶.

Against this backdrop, however, both the economic¹⁷ and social sustainability of refugees flow could be demonstrated. Focusing of the social development of the destination country, at least two points shall be recalled.

First of all, although in the short term migrants' employment seems to have a negative effect on the labour market, in the medium and long term, migrants' working force appears to be an essential component within the labour market. Given that migrants accept low-skilled jobs (that usually the natives are no longer inclined to carry out), not only they fill the "gap" of the labour market, but they could give their contribution to the public finance, by paying taxes and social security obligations. The achievement of such a goal, however, requires the State to provide a rapid and effective accommodation of migrants. Otherwise, as already underlined, both the undeclared work and the related migrants exploitation would prevail¹⁸.

A second benefit connected to migration has a long term effect on the destination State, being nevertheless of a fundamental importance. In fact, as underlined by the European Commission itself¹⁹, migration is the key to fight the actual challenge towards the ageing of the EU population and its demographic decrease.

As to migrant minors', the improvement of their conditions and their effective integration within the host community definitely has a long term positive impact on the development of both the host and the sending countries. Focusing on the for-

¹⁵ See TINO and CAUDRON, cit. *supra* note 2.

¹⁶ INTERNATIONAL MONETARY FUND STAFF DISCUSSION NOTE (prepared by AIYAR et al.), *The Refugee Surge in Europe: Economic Challenges*, January 2016, p. 4; M. BELL, "Irregular Migrants: Beyond the Limits of Solidarity?", in ROSS, BORGMANN-PREBIL (eds.), *Promoting Solidarity in the European Union*, 2010, Oxford University Press, pp. 151-165.

¹⁷ DULLIEN, *Paying the Price: the cost of Europe's refugee crisis*, European Council on Foreign Relations, April 2016.

¹⁸ See the EUROPEAN COMMISSION, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration, 13 May 2015, COM(2015) 240 final, p. 9.

¹⁹ *Ibidem*, p. 14.

mers, minors' integration leads to an additional benefit. The burden a State takes on to ensure unaccompanied minors an adequate education²⁰ is usually compensated when minors become workers: unlike adult migrants, who spent a significant period of their life in another country, minors are expected to grow up and live in the country where they found asylum. As a consequence, under the destination country perspective, giving minors an adequate education means investing in their potentialities as future workers. This being the case, migrant minors will not only repay the costs of their education, but also provide additional financial incomes for the State which granted them asylum.

Notwithstanding the important contribution that migrants – and minors among them – could bring to the financial, social and cultural development of the European societies, its effective accomplishment depends on States' capacity to ensure migrants' integration since their arrival. Otherwise, not only irregular migration would constitute a mere economic and social cost for the destination State, but it could also lead to the further negative consequences (e.g. the exploitation by criminal networks) already outlined.

4. – *The protection of asylum seeking minors in Europe: an overview*

The previous section has clarified that the creation of adequate mechanisms to accommodate unaccompanied children seeking for protection in Europe is of paramount importance first to ensure Member States' compliance with the respect of fundamental rights, second to let them benefit from the social and economic benefits of migration.

Entering the analysis of the European legal framework²¹, the protection of asy-

²⁰ The right to education is guaranteed both by Art. 17 of the European Social Charter and Art. 2, Protocol No. 1 ECHR. With regard to the former provision, despite the wording of the appendix of the ESC(r) which limits its application to migrants lawfully resident within a contracting State, the European Committee of Social Rights (*COHRE v. Italy*, Complaint No. 58/2009, Judgment of 25 June 2010, para. 33) has clarified that "the part of population which does not fulfil the definition of the appendix cannot be deprived of their rights linked to life and dignity under the ESC(r)". With those words, KTISTAKIS, cit. *supra* note 12, p. 59. Therefore, the protection foreseen by Art. 17 of the European Social Charter applies to all migrants, whether regular or not, under the age of 18 years old. At this regard, see also SPENCER, HUGHES, cit. *supra* note 14, p. 612; DE GROOF, LAWERS (eds.), *No person shall be denied the right to education. The influence of the European Convention of human rights in the right to education and rights in education*, Wolf Legal Publishers, 2004, pp. 29 – 33.

²¹ On migration law under the ECHR and the EU, see EUROPEAN AGENCY OF FUNDAMENTAL RIGHTS,

lum seeking minors is tackled by both the Council of Europe²² and the European Union. These two international organisations share the common attempt to implement the living conditions of unaccompanied minors, although necessarily following different approaches.

4.1. – The protection of unaccompanied minors under the European Convention on Human Rights

When focusing on the Council of Europe, the preliminary observation has to be that the European Convention of Human Rights does not include a specific provision on asylum seekers²³. It is not surprising that, at the time when the Convention was created, the European States did not perceive migration flows as a relevant topic under a fundamental rights perspective. Nevertheless, the necessity to protect migrants' fundamental rights has progressively become an issue that the European States have to face and the European Convention of Human Rights has to deal with.

Hence, as in other fields of law, the intervention of the European Court of Human Rights has been of a paramount importance to let the protection of refugees and asylum seekers become reliable under the ECHR.

In addition to the recognition of the *non-refoulement* principle²⁴, the European Court of Human rights has specified that other articles, namely Articles 3, 4 and 8 ECHR, can be triggered within asylum related cases.

Article 3 ECHR, covering the prohibition of torture, has been applied in several

COUNCIL OF EUROPE, *Handbook on European law relating to asylum, borders and immigration*, 2014, available at: <http://fra.europa.eu/en/theme/asylum-migration-borders>.

²² See TONELLI, "Irregular migration and human rights: a Council of Europe perspective", in BOGUSZ, CHOLEWINSKI et al. (eds.), *Irregular migration and human rights: theoretical, European and international perspectives*, Koninklijke Brill NV, The Netherlands, 2004, pp. 301 – 309.

²³ KTISTAKIS, cit. *supra* note 12, p. 17.

²⁴ *Saadi v. Italy* (GC), Application no. 37201/06, Judgment of 28 February 2008, para. 127; *Chahal v. the United Kingdom* (GC), Application no. 22414/93, Judgment of 15 November 1996, para. 79. At this regard, see also the *Guidelines on human rights protection in the context of accelerated asylum procedures*, established by the COMMITTEE OF MINISTERS on 1 July 2009 at the 1062nd meeting of the Ministers' Deputies. Furthermore, the European Court of Human Rights has also recognized the existence of an indirect *non-refoulement* principle, prohibiting any transfer to States in turn susceptible of transferring the person to a third country where he/she is at risk (*M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011). On this judgment see MORENO-LAX, "Dismantling the Dublin System: *M.S.S. v. Belgium and Greece*", *European Journal of Migration and Law*, 2012, Vol. 14, pp. 1 – 31.

cases²⁵, where the European Court of Human Rights has stressed first of all its absolute nature and secondly that the right enshrined by Article 3 is a fundamental value of each democratic society²⁶.

Insofar as Article 4 of the ECHR foresees the prohibition of slavery and forced labour, the European Court of Human Rights has recognized its applicability anytime where the exploitation of migrants leads to human trafficking or forced labour²⁷.

As to Article 8 ECHR, the right to respect private and family life has received a broad and enhanced interpretation by the European Court which usually applies Article 8 to protect the irregular migrants' residence right against the unlawful removal to a third country²⁸.

The activism of the European Court of Human Rights in the field of migration law is absolutely beneficial under several points of view. First, it stresses that – disregarding the uniformity and efficiency of the CEAS – European States have the duty to protect asylum seekers' rights under the European Convention of Human Rights. Secondly, its case-law is extremely helpful in clarifying the ambiguities of the current CEAS: given the broad discretion that Member States currently have, the decisions of the European Convention of Human Rights can set common – although minimal – levels of protection.

²⁵ See, *Mahmundi and Others v. Greece*, Application No 14902/10, Judgment of 24 October 2012. With regard to unaccompanied asylum seeking minors, see European Court of Human Rights, *Rahimi v. Greece*, cit. *supra* note 9, where the European Court of Human Rights has ruled on the detention and lack of care of a 15 years old unaccompanied minor, who, after being arrived to Greece, was first put in detention for two days and then left to live in the streets. Hence, short periods of detention do not exclude the applicability of art. 3 ECHR. See also, European Court of Human Rights, *Mohammad v Greece*, Application No. 70586/11, Judgment of 11 December 2014. Finally, the case *Sh. D. and Others v. Greece*, Application No. 14165/16 is now pending in front of the European Court of Human Rights. On this topic, see GOODWIN-GILL, MCADAM, *The refugee in international law*, Oxford University Press, 2007, pp. 310 – 323.

²⁶ See HAILBRONNER (eds.), *EU Immigration and Asylum Law – Commentary*, C.H. Bert, Hart, Nomos, 2010, pp. 15 – 18.

²⁷ See EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 4 of the European Convention on Human Rights. Prohibition of slavery and forced labour*, 2nd Ed., Council of Europe/European Court of Human Rights, 2014.

²⁸ BELL, cit. *supra* note 16, pp. 151-165. Within the national case-law, see the enhancement of the right to family life by the UK Upper Tribunal in the case *The Queen on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM v the Secretary of State for the Home Department*, Judgement of 22 February 2016, JR/15401/2015.

Notwithstanding the merits of the European Court of Human Rights case-law, however, the achievements made within the European Convention of Human Rights can only prevent the migration crisis from exacerbating, but it is not due to the European Convention of Human Rights to provide a long term and an *ad hoc* mechanism to accommodate asylum applications and protect migrants' human rights. Hence, it follows from this latter remark that the best (and the only!) body holding the competence to elaborate adequate reception mechanisms for unaccompanied asylum seeking minors is the European Union.

4.2. – The European Union: the quest to accommodate and protect unaccompanied asylum seeking minors

In 1999, the European Union has been given the competence to fight against irregular migration as well as to protect the rights of migrants towards exploitation and trafficking²⁹. The European Union action in this field has progressively improved, thanks to the adoption of both directives and regulations which form the so-called Common European Asylum System (CEAS)³⁰.

Furthermore, at the constitutional level of the European Union, the European Charter of Fundamental Rights³¹ offers a direct protection to asylum seekers. In its Article 18, the Charter foresees that “[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention [...] and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union [...]”, while Article 19 of the Charter re-affirms the principle of *non-refoulement*.

When fundamental rights of minors are at stake, further articles acquire relevance.

First, Article 14 of the Charter foresees that everyone has the right to education:

²⁹ See Arts. 79 and 83 TFEU. On this topic, see ACOSTA ARCARAZO, GEDDES, “The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy”, *Journal of Common Market Studies*, 2013, Vol. 51, No. 2, p. 179 – 193; BALDACCINI, GUILD, TONER (eds.), *Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy*, Hart Publishing, 2007; HAILBRONNER, *Immigration and Asylum Law and Policy of the European Union*, Kluwer Law International, The Hague, 2000, pp. 1 – 568; GEDDES, *Immigration and European Integration. Towards fortress Europe?*, Manchester University Press, Manchester, 2000, pp. 110 – 130.

³⁰ On this topic see, *ex multis*, GUILD, MINDERHOUD, *The First Decade of EU Migration and Asylum Law*, 2012, Brill, pp. 1 – 400.

³¹ Charter of Fundamental Rights of the European Union, OJ C 202, 7 June 2016, pp. 389 – 405.

at this regard, it is important to recall that this right is likely to be jeopardised any-time a child is put in a form of detention.

Furthermore, Article 21 of the Charter is devoted to prohibit any discrimination on grounds of – *inter alia* – age; whereas Article 24 of the Charter specifically refers to minors: this latter provision enounces the best interest of child principle and stresses the duty to provide minors with protection and care³².

As a latter observation concerning the Charter, it has to be underlined that, after the entry into force of the Treaty of Lisbon, the relevance of the Charter has exponentially grown³³. Not only Article 6 TEU³⁴ now states that the Charter has the same value as the Treaties, thus being legal binding³⁵, but the Court of Justice seems particularly devoted in enhancing its role³⁶. In a recent decision concerning the migration field, for instance, the Court of Justice of the European Union has excluded that the Protocol No. 30 of the Treaty of Lisbon – which, as known, limits the application in the United Kingdom and Poland of the social rights covered by the Charter – is suitable to affect the implementation of the European Union asylum law³⁷.

5. – *Rethinking the Common European Asylum System to provide an effective response to the migration challenge*

³² In connection to the duty of care and protection, Art. 32 of the Charter, which prohibits child labour, can be recalled.

³³ See PEERS, MORENO-LAX, GARLICK, GUILD (eds.), *EU Immigration and Asylum Law (Text and Commentary)*, Volume 3: EU Asylum Law, 2nd Rev. Ed., 2015, pp. 27 – 63.

³⁴ Treaty on the European Union, OJ C 326, 26 October 2012, pp. 13 – 390.

³⁵ See PEERS et al., *The EU Charter of Fundamental Rights. A Commentary*, Oxford, 2014.

³⁶ European Court of Justice, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, 26 February 2013, ECLI:EU:C:2012:340; case C-399/11, *S. Melloni v Ministerio Fiscal*, 26 February 2013, ECLI:EU:C:2013:107. At this regard, see APPANAH, “Charte des droits fondamentaux de l’Union européenne et Convention européenne des droits de l’homme: entre cohérence et légitimation. A propos des arrêts Åklagaren c/ Hans Åkerberg Fransson et Stefano Melloni c/ Ministerio Fiscal rendus par la Cour de justice le 23 février 2013”, *Revue générale de droit international public*, 2014, pp. 333 – 356 ; HANCOX, “The meaning of “implementing” EU law under Article 51(1) of the Charter: Åkerberg Fransson”, *Common Market Law Review*, 2013, pp. 1411 – 1431; SARMIENTO, “Who’s afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe”, *Common Market Law Review*, 2013, pp. 1267–1304.

³⁷ See Joined Cases C-411/10 and C-493/10, *N. S. v Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, 21 December 2011, ECR, 2011, p. I-13905.

The observations highlighted in the previous sections explain why reception procedures are essential tools to shift from the negative implications of migration to its positive effects. In this perspective, it is therefore essential to tackle the current rules within the Common European Asylum System to assess whether they foresee adequate mechanisms, not only to accommodate but also to progressively integrate migrant minors arriving in the European Union.

5.1. – The current deficiencies of the CEAS and the struggle to ensure the protection of unaccompanied asylum seeking minors

Notwithstanding its purposes, the current Common European Asylum System has proven to be inadequate in providing an efficient and uniform accommodation of asylum seekers, in particular when the asylum requests come from unaccompanied minors. As a matter of fact, since the Dublin regulation and the directives constituting the Common European Asylum System have been adopted, a number of practical deficiencies have progressively emerged³⁸.

Therefore, in its Communication “Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe”³⁹, the European Commission has expressed the need to rethink the European Union asylum rules in the light of an improved solidarity among Member States⁴⁰. As a general observation, it has to be underlined that the current reception mechanism seems more devoted in tossing back States’ responsibility and accommodating national prerogatives, rather than in achieving unaccompanied minors’ best interest and fundamental rights⁴¹.

³⁸ At this regard, see NASCIMBENE, “Refugees, the European Union and the ‘Dublin System’. The Reasons for a Crisis”, European Papers, Vol. 1, 2016, p. 101 ff.

³⁹ Communication from the Commission to the European Parliament and the Council of the 6 April 2016, *Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe*, COM(2016) 197 final.

⁴⁰ See MUNARI, “The Perfect Storm on EU Asylum Law: The Need to Rethink the Dublin Regime”, *Diritti Umani e Diritto Internazionale*, 2016, pp. 517 – 548; FAVILLI, “L’Unione europea e la difficile attuazione del principio di solidarietà nella gestione dell’«emergenza» immigrazione”, *Quaderni Costituzionali*, 2015, pp. 785 – 787; MITSILEGAS, “Solidarity and Trust in the Common European Asylum System”, *Comparative Migration Studies*, Vol. 2, No. 2, 2014, pp. 181 – 202; BELL, cit. *supra* note 16.

⁴¹ At this regard, an opposite opinion seems to be supported by the German Federal Administrative Court, according to which “the provisions on responsibility for unaccompanied minors in Article 6 of the Dublin II Regulation are protective of the individual, as they not only govern relationships between Member States but (also) serve to protect fundamental rights”(Judgment of 16 November 2015, 1 C 4.15).

With regard to the several issues arising from its application, the rules on the allocation of responsibility constitute a first example. The rationale behind Article 8 of the so-called Dublin III regulation⁴² is twofold. First, these rules stimulate Member States' commitment to protect their external borders. By assuming that a State should be responsible of managing the irregular entry into its territory, the State's failure to protect its borders triggers the obligation to address migrants' claims⁴³. Second, the allocation of responsibility rules have been designed to address migration claims following a uniform and consistent approach: the "first lodged rule" in particular has been conceived to prevent overlaps or gaps in processing asylum applications.

However, when triggered towards vulnerable people, such as minors, the first lodged rule usually clashes with the obligation to ensure minors' best interest and take into account their vulnerability⁴⁴.

At this regard, the Court of Justice of the European Union highlighted that secondary movements clearly facilitate children disappearance or smuggling. Accordingly, the Court of Justice stated that the best interest of the child principle implies that a minor's transfer to another Member State shall in principle be avoided every time where it would expose the child to an unreasonable risk of being subjected to a degrading treatment⁴⁵. Furthermore, ruling upon Article 6 of the so-called Dublin

⁴² Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, cit. *supra* note 6.

⁴³ See DEN HEIJER, RIJPMAN, SPIJKERBOER, "Coercion, prohibition, and the great expectations: the continuing failure of the Common European Asylum System", *Common Market Law Review*, pp. 607 – 642, p. 615.

⁴⁴ With specific regard to unaccompanied minors, see PEERS, "The Dublin Regulation: Is the End Night? Where Should Unaccompanied Children Apply for Asylum?", *EU Law Analysis*, 21 January 2016, available at: <http://www.eulawanalysis.blogspot.it>.

⁴⁵ C-4/11, *Bundesrepublik Deutschland v Kaveh Puid*, 14 November 2013, ECLI:EU:C:2013:740, para. 36: "where the Member States cannot be unaware that systemic deficiencies in the asylum procedure and in the conditions for the reception of asylum seekers in the Member State initially identified as responsible in accordance with the criteria set out in Chapter III of Council Regulation (EC) No 343/2003 [...] the Member State which is determining the Member State responsible is required not to transfer the asylum seeker to the Member State initially identified as responsible and, subject to the exercise of the right itself to examine the application, to continue to examine the criteria set out in that chapter, in order to establish whether another Member State can be identified as responsible in accordance with one of those criteria or, if it cannot, under Article 13 of the Regulation".

II regulation⁴⁶, the Court specified that – if the minor presents two or more asylum requests – this provision should be interpreted in the sense that “the Member State in which that minor is present after having lodged an asylum application there is to be designated the ‘Member State responsible’”⁴⁷.

A second criticism of the current Common European Asylum System is linked to the identification procedure and the age assessment.

At this regard, it has first of all to be recalled that the European Court of Human Rights has found the illegitimacy of the so-called push-back operations and the related identification procedures carried out on board⁴⁸. Accordingly, both the identification procedures and the age assessment must be performed within the territory of a Member State.

Secondly, insofar age assessment is the first step to follow in order to understand whether the asylum seeker is entitled to receive additional care, the methods implied to assess the claimants’ age have to be fair and accurate. Notwithstanding the obligation to give applicants the benefit of the doubt⁴⁹, the techniques applied within the Member States vary significantly and they are usually inaccurate⁵⁰. Furthermore, Article 25 of the Asylum Procedure Directive⁵¹ allows Members States to accomplish medical examinations for the purpose of the age assessment, whenever, “following general statements or other relevant indications, Member States have doubts concerning the applicant’s age to assessments”. In this respect, it has to be stressed that, first of all, medical examination should be always avoided since it

⁴⁶ Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ 2003, L 50, pp. 1-10. Its Art. 6 is now Art. 8 of the Dublin III regulation, No. 604/2013, cit. *supra* note 6.

⁴⁷ C-648/11, *The Queen, on the application of MA and Others .v Secretary of State for the Home Department*, 6 June 2013, ECLI:EU:C:2013:367, para. 66.

⁴⁸ *Hirsi Jamaa and others v. Italy*, Application No. 27765/09, Judgment of 23 February 2012. At this regard, see BORELLI, STANFORD, “Troubled Waters in the Mare Nostrum: Interception and Push-Backs of Migrants in the Mediterranean and the European Convention on Human Rights”, *Review of International Law and Politics*, 2014, vol. 10, p. 29 – 69.

⁴⁹ See EUROPEAN COUNCIL ON REFUGEES AND EXILES, *Detriment of the Doubt: Age Assessment of Unaccompanied Asylum-Seeking Children*, AIDA Legal Briefing No. 5, December 2015, pp. 1 – 8.

⁵⁰ See FELTZ, *Age assessment for unaccompanied minors. When European countries denied children their childhood*, Doctors of the Word – Médecins du monde International Network, 28 August 2015, pp. 1 – 17. See also, European Court of Human Rights, *Mohammad v Greece*, cit. *supra* note 25.

⁵¹ Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, cit. *supra* note 6.

certainly affects minors' well-being. Secondly, that the huge discretion given to Member States towards the suitability of the medical examination exacerbates the imbalances within the CEAS.

A third shortcoming issuing from the 'concrete application' of the CEAS is related to a further phase of the asylum application: the appointment of a guardian. Given the absence of any deadline for such an assignment⁵², not only Member States follow different time schedules, but most of them deal with significant delays in assigning legal representatives. As a consequence, and allegedly pursuing the aim of keeping children safe from traffickers⁵³, Member States usually put unaccompanied minors in various forms of detention⁵⁴.

Hence, stressing the necessity to improve the solidarity among Member States and trying to avoid the breakdown of the CEAS, in its recent proposals the European Commission has addressed most of the criticisms concerning the situation of asylum seeking minors.

5.2. – Reforming the CEAS to foster the best interest of the child: a (possible) step forward

Between May and July 2016, six different proposals, tackling each normative instrument of the CEAS, have been presented. Within the three proposals adopted in May 2016⁵⁵, the proposal focusing on the recast of the Dublin III regulation⁵⁶

⁵² Art. 31 of the Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, cit. *supra* note 6, merely stresses that such an appointment must be completed "as soon as possible" after the granting of international protection.

⁵³ See, PEERS, MORENO-LAX, GARLICK, GUILD (eds.), cit. *supra* note 33, p. 250.

⁵⁴ At this regard, see European Court of Human Rights, *IM v. France*, Application No. 9152/09, Judgment of 2 May 2012, where the European Court of Human Rights has noticed that asylum seekers in detention have to cope with significant obstacles in successfully pursuing their claims.

⁵⁵ On May, the 4th 2016 the Commission has adopted the following Proposals: the Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final; the Proposal for a Regulation of the European Parliament and the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, COM(2016) 271 final; Proposal for a Regulation of the European Parliament and the Council on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for in-

pursues the improvement of minors' guarantees. As regard to the acts dating July 2016, two approaches are suggested. First, the Commission highlights the necessity to amend the reception condition directive, promoting a recast of such a normative instrument⁵⁷. Secondly, the European Commission goes further, by suggesting the adoption of two new regulations⁵⁸, replacing respectively the asylum procedure directive⁵⁹ and the qualification directive⁶⁰.

Notwithstanding the various concerns that also this foreseen reform entails⁶¹, the recent initiatives have at least the merit to support the adoption of two regulations instead of recasting the current directives. The regulation appears to be the right normative instrument to be exploited in the field of migration and asylum law insofar as its direct and general application⁶² within Member States would achieve the degree of consistency that has been lacking ever since. Therefore, as regard to the choice of the legal instrument to be adopted, the Commission proposals have to

international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast), COM(2016) 272 final.

⁵⁶ Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), cit. *supra* note 55.

⁵⁷ Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), of the 13 July 2016, COM(2016) 465 final.

⁵⁸ Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, of the 13 July 2016, COM(2016) 466 final; Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, of the 13 July 2016, COM(2016) 467 final.

⁵⁹ Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection, cit. *supra* note 6.

⁶⁰ Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, cit. *supra* note 6.

⁶¹ See *infra* Section 6.

⁶² See Art. 288 TFEU, Treaty on the functioning of the European Union, OJ C 326, 26 October 2012, pp. 47–390.

be welcomed as they would eventually impose common rules on Member States and potentially void the broad discretion that Member States currently rely on.

Entering the analysis of the provisions on asylum seeking children, the suggested reform aims at introducing several changes.

A first major amendment focuses on the establishment of strict deadlines: as already stressed, the inadequacy of the current CEAS is definitely connected with the lack of a time schedule pending on Member States when dealing with asylum seekers. Instead of a general reference to the Member States' duty to accommodate unaccompanied minors claims, the new proposals insert a five days deadline covering the appointment of both a legal representative when an asylum application is made⁶³, and a guardian when the international protection is granted⁶⁴.

Although the deadline in allocating guardians has the beneficial effect of imposing on Member States an obligation to act efficiently towards the protection of minors from the moment in which the asylum claim is made, a criticism still needs to be solved. To accomplish their duty, guardians need not to be overwhelmed by the number of charges they are required to deal with at the same time. At this regard, even if Article 22 of the Proposal for a procedures regulation stresses the necessity that each guardian shall be responsible for a reasonable number of minors⁶⁵, the concept of reasonableness may vary among Member States, due to the huge gap in terms of number of applications⁶⁶.

As a further amendment, the right of children to be heard and informed is tack-

⁶³ Art. 22(1) of the Commission Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, cit. *supra* note 58, and art. 23 of the Proposal for a directive laying down standards for the reception of applicants for international protection (recast), cit. *supra* note 57.

⁶⁴ Art. 36, Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, cit. *supra* note 58.

⁶⁵ Art. 22 of the Commission Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, cit. *supra* note 58, stating, in its para. 5, that "the responsible authorities shall not place a guardian in charge of a disproportionate number of unaccompanied minors at the same time, which would render him or her unable to perform his or her tasks effectively". Secondly, in its para. 6, Art. 22 recalls that "the guardian shall inform the unaccompanied minor about the meaning and possible consequences of the personal interview and, where appropriate, about how to prepare himself or herself for the personal interview".

⁶⁶ See EUROPEAN COUNCIL OF REFUGEES AND EXILES, *ECRE Comments on the Commission Proposal for an Asylum Procedures Regulation*, COM(2016) 467, November 2016, p. 26.

led under two points of view.

First of all, the Commission proposal for a procedures regulation stresses the right of each child to be personally interviewed⁶⁷, unless such an opportunity does not comply with his/her best interest. Considering that Article 14 of the directive 2013/32 leaves to Member States the discretion to determine in national legislation the cases in which a minor shall be given the opportunity of a personal interview, it seems that the provision suggested in the proposal for an Asylum Procedure Regulation⁶⁸ would both increase minors' guarantees and implement the consistency within the Member States' approach.

Minors' right to be informed is also tackled by Article 5 of the proposed recast of directive 2013/33⁶⁹. According to the new version of Article 5, the European Union Agency for Asylum will develop a standard template reporting all the essential information about the application process which should be written in a language understandable for the applicant. To accommodate minors, the second paragraph of Article 5 foresees the possibility to adapt the template to their special needs, as well as to supply the information orally.

Even though this latter provision would require a proactive approach by Member States, it seems that the creation of a standard template could be considered an essential achievement, in terms of both uniformity and adequacy of the reception process.

Within the recast of the Dublin III regulation⁷⁰, the Proposal faces the element having mostly affected the efficiency and the quality of the asylum decisions so far: the allocation of responsibility rule.

At this regard, the proposal envisages new rules for determining the Member State responsible for examining the applications lodged by unaccompanied minors. According to the new version of Article 8, as a special guarantee for minors, their transfer to the responsible Member State (or to the Member State of allocation)

⁶⁷ Art. 21, Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, cit. *supra* note 58.

⁶⁸ Ibidem.

⁶⁹ Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), cit. *supra* note 57.

⁷⁰ Proposal for a Regulation of the European Parliament and the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), cit. *supra* note 55.

should be subordinated to the assessment of the child's best interest. In order to guide such an assessment, Article 8 specifies that the Member State where the minor is supposed to be transferred has to meet the requirements foreseen in other provisions of the CEAS⁷¹.

Finally, the new version of Article 10(4) gives the responsibility upon the asylum claim and the child's protection to the Member State where the minor has *first* lodged his/her application, unless it is demonstrated that the best interest of the minor would be infringed. This new wording, however, seems not compliant with the decision of the Court of Justice of the European Union in the *M.A.* ruling⁷², where the Court specified that "as a rule, unaccompanied minors should not be transferred to another Member State"⁷³. Insofar as the suggested provision foresees a presumption against the applicant, i.e. the asylum seeking minor, it seems that its implementation would indeed jeopardize the rationale behind the decision of the Court of Justice of the European Union⁷⁴.

6. – *New proposals, old problems: will an adequate asylum system ever see the light?*

As already underlined, the recent proposals try to address the several dysfunctions preventing the CEAS from being an adequate system of accommodation of asylum seeking minors. Some of the issues that have emerged within the application of the current CEAS, however, still need to be solved. In addition to the improvements that have been highlighted in the previous section, the Commission proposals raise several concerns regarding specific topics which have either not been tackled⁷⁵, or not properly addressed.

⁷¹ Specifically, directive 2013/33/EU, cit. *supra* note 6: Art. 14, which protects minors' right to schooling and education, and Art. 24, which foresees special provisions for unaccompanied asylum seeking children. Furthermore, Art. 25 of directive 2013/32/EU, cit. *supra* note 6, recognises specific guarantees for unaccompanied minors.

⁷² C-648/11, *The Queen, on the application of MA and Others v Secretary of State for the Home Department*, cit. *supra* note 47.

⁷³ *Ibidem*, para. 55.

⁷⁴ EUROPEAN COUNCIL ON REFUGEES AND EXILES, *ECRE comments for a Commission proposal for a Dublin IV Regulation*, COM (2016)270, October 2016, pp. 10 – 13.

⁷⁵ Such as the possibility to trigger, at least with regard to unaccompanied minors, the mechanisms foreseen by the Council directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of

Focusing on the latter case, the proposal for the adoption of a regulation on the asylum procedures restricts the Member States' possibility to apply both the accelerate examination⁷⁶ and the border procedure⁷⁷ when dealing with unaccompanied minors. Following the suggestions of the majority of stakeholders, the draft subordinates the applicability of the accelerate examination and the border procedure to the requirement of providing minors with an adequate support⁷⁸. Although both procedures are considered to have a backup function, they cannot provide the necessary guarantees to accommodate the vulnerability of minors. Under this point of view, a better approach would have been to exclude from the field of application of both borders and accelerate procedures minors' claims, instead of leaving to Member States the discretion on how to trigger such mechanisms⁷⁹.

Furthermore, even though the Proposals admit the possibility of detaining children to protect them from trafficking or to give the national authorities enough time to carry out the asylum procedures, it seems that the only consistent approach with the best interest of the child principle would have been to permanently prohibit minors' detention⁸⁰.

A final aspect which has not been addressed properly concerns the age assessment and the medical examination. Apart from the obvious consideration that the fairness of this technique impacts on the overall asylum procedure, the Commission Proposal presents several weaknesses. First of all, the Proposal introduces the principle of mutual recognition towards the age assessment without taking into due account that the assessment procedures vary significantly within Member States⁸¹. Secondly, the Proposal omits to reinforce the idea that medical examination should be employed only as a last resort measure: not only medical age assessment tech-

efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L212, 7 August 2001, pp. 12 – 23.

⁷⁶ Art. 40, Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, cit. *supra* note 58.

⁷⁷ *Ibidem*, Art 41.

⁷⁸ *Ibidem*, Art. 19(2).

⁷⁹ See EUROPEAN COUNCIL ON REFUGEES AND EXILES, *ECRE Comments on the proposal for an Asylum Procedures Regulation*, cit. *supra* note 66, pp. 49 – 51.

⁸⁰ *Ibidem*, p. 50.

⁸¹ Art. 24(6), Proposal for a regulation establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, cit. *supra* note 58.

niques are not scientifically reliable⁸², but they do also frustrate minors' psychological well-being.

The analysis carried out in the present paper shows two main issues: on the one side, the inadequacy of the current Common European Asylum System, on the other side, the need to "build up a coherent and comprehensive approach to reap the benefits and address the challenges deriving from migration"⁸³.

The purpose highlighted by the European Commission can be achieved only if two specific conditions are met. First, the implementation of strong collaboration mechanisms between Member States to ensure the uniform accommodation of migrants and to avoid the risk to overwhelm border States' reception capacity⁸⁴. Second, the introduction of uniform asylum rules to foster the protection of migrants' fundamental rights: as the case of minors clearly demonstrates, the lack of consistency is likely to entail poor quality asylum decisions⁸⁵.

As a further step towards the achievement of a fair and efficient EU asylum system, the recent proposals have to be appreciated insofar as the amendments and the innovations suggested by the European Commission appear to bring some improvements.

Nevertheless, at least with regard to unaccompanied asylum seeking children, it seems that the Proposals still underestimate the impact of some core issues, which – if not fruitfully addressed – will definitely void the goal sought by the European Commission.

Titolo Abstract

In recent years, migration has become a huge phenomenon that all European States have the duty to deal with. When asylum seekers are unaccompanied minors, the difficulties in tempering the freedom of action of States with asylum seekers' human rights increase. Unaccompanied children are in fact weaker than other migrants because of their vulnerable age.

Stressing the idea that unaccompanied minors' fundamental rights can be effectively protected only via the enhancement of solidarity within Member States, the paper investigates the current rules of the Common European Asylum System (CEAS) to highlight their inadequacy in accommodating migrant minors as well as in respecting their human rights. Secondly, the paper focuses on the reforms that have

⁸² EUROPEAN COUNCIL ON REFUGEES AND EXILES, *ECRE Comments on the proposal for an Asylum Procedures Regulation*, cit. *supra* note 65, pp. 26 – 27.

⁸³ EUROPEAN COMMISSION, *A European Agenda on Migration*, cit. *supra* note 18, p. 2.

⁸⁴ DEN HEIJER, RIJPMAN, SPIJKERBOER, cit. *supra* note 43, pp. 623 – 642.

⁸⁵ WARREN, YORK, cit. *supra* note 11.

been recently suggested to demonstrate that – despite being a slight improvement – the Commission proposals do not solve all the issues related to both the respect of asylum seeking minors' fundamental rights, and minors' successful integration in the host countries.

Parole chiave (6):

Refugee – Asylum seekers – Unaccompanied minors – Common European Asylum System (CEAS)
– Commission proposals – European Union

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